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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of) MM Docket No. 94-20
FAMILY BROADCASTING, INC.) File No. BPH-910924MB
For Construction Permit for a)
New FM Station on Channel 229A)
Hague, New York)

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge
John M. Frysiak

MASS MEDIA BUREAU'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respectfully submitted,
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Preliminary Statement

1. By Hearing Designation Order, 9 FCC Rcd 1564 (1994) ("HDO"), the Commission, by the Chief, Audio Service Division, designated the above-captioned application of Family Broadcasting, Inc. (Family) for hearing on the following issues:

- (a) whether the applicant at the time it so certified had reasonable assurance that its proposed site would be available to it;
- (b) whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant misrepresented to the Commission the availability of its specified site; and
- (c) if issue 1(b) above is resolved in the affirmative, the effect thereof on the applicant's qualifications to be a Commission licensee.

The HDO further specified that grant of a permit to Family shall be subject to the following condition:

The permittee/licensee, in coordination with other users of the site, must reduce power or cease operations as necessary to protect persons having access to the site, tower or antenna from radio frequency radiation in excess of FCC guidelines.

2. On November 1, 1994, Family filed a petition for leave to amend its application to specify a new antenna site. The proposed new antenna site is the same site Family specified in an amendment filed with the Commission on January 27, 1992. Family's 1992 amendment was rejected in the HDO because it was not accompanied by a "good cause" showing. At the hearing, because the good cause determination is contingent upon the resolution of the above specified issues, the Presiding Judge

directed that comments on Family's November 1, 1994, amendment be included in the Bureau's proposed findings of fact and conclusions of law. Tr. 12-13.

3. A pre-hearing conference in this proceeding was held on May 24, 1994. A hearing session was held on November 2, 1994. By Order, FCC 94M-612, released November 9, 1994, the record in this proceeding was closed.

PROPOSED FINDINGS OF FACT

Family's Proposal

4. Alexander McEwing is the president, a director and owner of 39.8 percent of the stock of Family. He has been the president and a director of Family since February 1988. Family is the licensee of WGLY-FM, Waterbury, Vermont; WGLV-FM, Hartford, Vermont; and, low power television station W39AS, Burlington, Vermont. Family is also the permittee of WMNV-FM Rupert, Vermont. McEwing is also the president and a director of Christian Ministries, Inc., which has applied for noncommercial FM stations in Bolton (BPED-871215MA) and Barre (BPED-930311MA), Vermont. (Family Ex. 1; Tr. 28).

5. McEwing was responsible for preparing and reviewing Family's application for Hague. Family wanted to utilize the Hague facility as a repeater station, repeating the programming on Family's FM station, WGLY. In looking for an antenna site

for Family's proposed facility McEwing determined that the best location would be an existing tower on Mt. Defiance. He felt that of the sites available, the Mt. Defiance site would provide the best coverage of Hague, and, as an existing site, would enable family to expedite service to the public. Fam. Ex. 1, Tab A, p. 1; Tr. 34-5; 57.

6. McEwing called David Gallety, the executive director of WAMC, an FM station which operates on the Mt, Defiance site, to ascertain who owned the tower. McEwing had met Gallety previously when both were involved in a proceeding for a new station in Voorheesville, New York. Gallety told him that the tower was owned by the Fort Ticonderoga Association and that McEwing should contact Nick Westbrook at the Association. Gallety provided Mcewing with Westbrook's telephone number. During the conversation McEwing asked Gallety if there was space on the tower for another antenna. Gallety told him space on the tower was tight, but he thought there could be space available. Tr. 35-8.

7. After speaking with Gallety, McEwing called Westbrook. When he reached Westbrook, McEwing introduced himself either as manager or president of Family. He told Westbrook that Family wanted a repeater site in the area and inquired whether the Mt. Defiance site was available. McEwing told Westbrook that Family was under time constraints and wanted to get its application on

file as soon as possible. McEwing asked Westbrook if he had any objection to Family specifying the Mt. Defiance site in its application. Westbrook replied that he needed a formal proposal. Such a proposal, he told McEwing, should include Family's tax status, the rent Family would be willing to pay, the time frame involved, the amount of electricity that would be required and the amount of space in the transmitter room that Family would need. Westbrook told him the formal proposal was needed for an upcoming meeting of the Association's Board of Directors. Tr. 42-44.

8. Before he called Gallety or Westbrook, McEwing had telephoned Family's communications counsel to ascertain what constituted "reasonable assurance" of an antenna site. Counsel had informed him that reasonable assurance consisted of two parts: permission to use the site and availability of the site. Tr. 33-34. McEwing believed that he had obtained "reasonable assurance" that the Mt. Defiance site would be available from speaking with Westbrook. He assumed that when Westbrook asked him to submit a formal proposal, that Westbrook was authorizing the site's use. He believed that there was a site available and that it was available to Family because Westbrook did not object to Family's proposed use of the site. Tr. 46-7.

9. After speaking with Westbrook, but before Family filed its application, McEwing received a letter dated September 19,

1991, from Family's communications counsel. In that letter counsel stated:

Section VII, Q.3. Please review the information on the site certification carefully to determine if it is completely accurate. Recall that the Commission requires no more (but no less) than that Family has reasonable assurance to use the site specified in the application. Reasonable assurance means, at a minimum, permission to use the site. The permission may be given orally--it need not be in writing--but it must be unambiguously given. Fam. Ex. 1, Tab B.

10. McEwing received the above letter five days before Family's application was filed. The letter, he claimed, did not create any question in his mind as to whether the permission he had received to use the Mt. Defiance site was "unambiguously given." McEwing believed that he had received unambiguous permission to use the site because, if Westbrook had had any objection, Westbrook would have stated it. Tr. 47-8.

11. McEwing never sent Westbrook the written proposal that Westbrook had requested. After speaking with Westbrook, McEwing became involved in other, unrelated matters. When McEwing focused attention again on Family's Hague application, it was time to publish the public notice of its filing. On Monday, November 11, 1991, Family ran the public notice in the Times of Ti. Family's notice stated, inter alia, that, "[t]he antenna and transmitter will be located at the top of Mount Defiance." Tr. 48-9; MMB Ex. 1, Attachment 1.

12. By letter dated November 14, 1991, Westbrook informed McEwing that he was "greatly disturbed to read the legal notice in the Times of Ti ... declaring your intention to seek approval from the FCC for an FM broadcast facility based on Mount Defiance." Westbrook further stated that, "[n]either you, nor Family broadcasting, nor Harvest Broadcasting, nor any other related entity have approval to do so from the property owners, the Fort Ticonderoga Association." In addition, Westbrook noted:

When you telephoned in early September to inquire about lease possibilities during this current FCC "window," I stated clearly that we would consider written proposals only, detailing technical and financial implications. I noted that we had an upcoming Board of Trustees meeting in early October. Your only subsequent communication was the legal notice referred to above.

Fam. Ex. 7.

13. When McEwing received Westbrook's letter, he tried to call Westbrook but could not reach him. McEwing then wrote a letter, dated November 18, 1991, and faxed it to Westbrook. In his letter McEwing stated in pertinent part:

I specifically told you on the phone when I talked with you, that the FCC is a long process and that if you had no objections we would be filing an application for Hague, NY with a proposed transmitter on Mt. Defiant (sic) obviously pending your formal approval. We have a written option on another transmitter site to use for this proposed facility. But, it was my impression from you that your organization might have some interest in leasing space for the right price and terms - by legal definition of "reasonable assurance" - that impression is all that is necessary to file an FCC

application - it gets the long process rolling.

Our intention was to file the application based on our impression that there was tower rental opportunity available, and then formally submit the letter you requested.

Fam. Ex. 1, Tab A, Attachment C.

14. McEwing denies that Westbrook, as he states in his letter, told him during their September telephone conversation that the Fort Ticonderoga Association would only consider written proposals detailing technical and financial implications. He claims that he did not point out Westbrook's misstatement in his November 18, 1991, letter to Westbrook because his primary purpose for writing the letter was to placate Westbrook and he did not want to be adversarial. Tr. 53-4; 56.

Conclusions of Law

Availability of Site

1. The Commission's reasonable assurance standard is a liberal one. It is well established that "[a]ll that is ordinarily necessary for reasonable assurance is some clear indication from the landowner that is amenable to entering into a future arrangement with the applicant for the use of the property as a transmitter site, on terms to be negotiated, and that he would give notice of any change of intention." Elijah Broadcasting Corporation, 5 FCC Rcd 5350, 5351 (1990). A

subjective belief by the applicant does not meet the reasonable assurance standard. Id. at 1636. Moreover, the fact that a property owner has indicated that he will discuss the possibility of a lease at a future date does not, absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance than an unrejected offer. El Camino Broadcasting Corp., 12 FCC 2d 25, 26 (Rev. Bd. 1968). Similarly, a mere indication from a site owner that he could "foresee no problem" in making the site available is insufficient for reasonable assurance. Progressive Communications, Inc., 61 RR 2d 560 (Rev. Bd. 1986). Finally, an applicant may not rely on a negative inference drawn from the site owner's general statement of non-availability to claim that in certain other circumstances the site might become available. Genesee Communications, Inc., 3 FCC Rcd at 3595 (Rev. Bd. 1988).

2. Here it is abundantly clear that there was no clear indication by Westbrook that the Fort Ticonderoga Association was amenable to entering into a future arrangement with Family for the use of Mount Defiance as an antenna site. When McEwing asked Westbrook if he had any objection to Family specifying the site, Westbrook did not answer no. Rather, Westbrook replied that he needed a formal written proposal that would include Family's tax status, the rent Family would be willing to pay, the time frame involved, the amount of electricity required and the amount of space in the transmitter room that Family would

need. One inference of Westbrook's response was that without this information he could not approve of Family specifying the Mount Defiance site in its application.

3. McEwing's inference to the contrary that, because Westbrook did not state any objection, but rather had asked for a formal written proposal, the site would be available to Family, was unwarranted. This became clear when Westbrook learned from Family's legal notice in the Times of Ti that Family was proposing the Mount Defiance site. In a letter to McEwing, Westbrook described himself as "greatly disturbed to read the legal notice ...," and went on to unequivocally state that the Fort Ticonderoga Association had not given Family approval to specify the Mount Defiance site. He went on to state that, as he had stated in their telephone conversation, the Association "would consider written proposals only"

4. It is concluded that McEwing never obtained reasonable assurance that Family's proposed antenna site on Mount Defiance would be available for Family's use. At best, McEwing drew an unwarranted inference from Westbrook's failure to state an objection to its use.

Misrepresentation

5. It is well established that misrepresentation requires a false statement of fact made with an intent to deceive. Fox

River Broadcasting Inc., 93 FCC 2d 127, 129 (1983). Intent can be found when the evidence supports a reasonable inference. California Public Broadcasting Forum v FCC, 752 F.2d 670, 679 (D.C. Cir. 1985). It can also be found from a showing of motive or "logical reason or desire to deceive." Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1100 (Rev. Bd. 1982). The "bare existence of a mistake" in an application without any indication that the licensee meant to deceive the Commission will not raise a material question of fact. High Country Communications, 4 FCC Rcd 6237, 6238 (1989).

6. At the time McEwing spoke with Westbrook he was in a rush to obtain a site for Family's Hague application. He inferred from Westbrook's failure to enunciate an objection to his request for permission to specify Mount Defiance that Family had Westbrook's permission to do so. Based on his understanding of reasonable assurance, McEwing believed that Family could specify the site because it was available and because Westbrook had approved of its specification. The fact that Westbrook wanted Family to submit a formal written proposal further established in McEwing's mind that Westbrook had authorized Family's use of the site. McEwing apparently did not consider the formal written proposal necessary to obtain reasonable assurance. McEwing's failure to submit a proposal is consistent with his testimony that he believed he had obtained permission to specify the site from Westbrook during their telephone

conversation. While the inferences McEwing drew from his conversation with Westbrook may have been faulty, and as noted, supra, do not rise to reasonable assurance as defined by the Commission, they also do not support an inference of intentional deceit on McEwing's part.

7. Moreover, McEwing's claim that he believed that he had obtained reasonable assurance from Westbrook is supported by other record evidence. McEwing knew that Family would have to prepare and publish public notice of its selection of the Mount Defiance site in a local newspaper and that Westbrook and the Fort Ticonderoga Association would then become aware of Family's site intentions. To deliberately specify an unavailable site, knowing that your deception would be made known to those who knew the true facts, would not make sense. Also, McEwing, before calling Westbrook, consulted with his attorney to ascertain what constituted reasonable assurance. This evidences an intent to comply with the Commission's requirements with regard to Family's site specification. Finally, McEwing's November 18, 1991, letter to Westbrook, written when he first learned of Westbrook's opposition to Family's specification of the Mount Defiance site, is consistent with McEwing's testimony in this proceeding that he believed that he had reasonable assurance to specify the Mount Defiance site based on the absence of an objection by Westbrook.

8. Thus, it is ultimately concluded that Family did not intentionally seek to deceive the Commission by specifying the Mount Defiance site in its application.

Family's November 1, 1994, Amendment

9. Currently, Family is without an antenna site. On November 1, 1994, Family filed a petition for leave to amend its application to specify a new antenna site. The antenna site specified is the same antenna site Family specified in its January 22, 1992, amendment which was rejected in the HDO for failure to meet the good cause requirements of Section 73.3522(b)(1) of the Commission's Rules. There is no need to examine Family's good cause showing. Its amendment must be rejected in any case. The law is clear that "an applicant will not be permitted to amend [to a new transmitter site] where it did not have the requisite reasonable assurance to begin with" Rem Malloy Broadcasting, 6 FCC Rcd 5843 (Rev. Bd. 1991), citing South Florida Broadcasting Co., 99 FCC 2d 840, 845 n. 12 (Rev. Bd. 1984). Here, it has been concluded that Family never obtained reasonable assurance of the availability of its original antenna site. Consequently, Family cannot now be permitted to amend its application to specify a new site.

Ultimate Conclusions

10. It is ultimately concluded that Family never obtained reasonable assurance of the availability of the Mount defiant

antenna site specified in its application. It is also concluded that in specifying the Mount Defiance site, Family did not intend to deceive the Commission as to the site's availability. Finally, it is concluded that because Family never obtained reasonable assurance of the availability of the antenna site specified in its application, it cannot now be permitted to amend its application to specify a new site. Consequently, the application of Family for a construction permit for a new FM station to serve Hague, New York, is deficient and must be denied.

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January 31, 1995

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau certifies that she has on this 31st day of January 1995, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law"** to:

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